

FRANK L. YOUNG CO. *v.* McNEAL-EDWARDS CO.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT.

No. 490. Argued April 24, 27, 1931.—Decided May 18, 1931.

A Massachusetts statute provides that if an action be brought in the State by a nonresident, he shall be held to answer any action brought against him there by the defendant if the demands are of such nature that judgment or execution in the one case may be set off against judgment or execution in the other. The writ in such cross-action may be served on the attorney of record for the plaintiff in the "original action." A resident of Massachusetts sued a resident of another State for breach of warranty in a sale of fish oil and attached the drums, belonging to the nonresident, in which the oil had been shipped. The nonresident then sued the resident, in Massachusetts, for conversion of the drums; and thereupon the resident, dismissing the attachment suit, again sued the nonresident, on the same cause of action for breach of warranty, and served the summons on the attorney for the nonresident in the suit brought by the latter. *Held*:

1. The service was good *in personam* under the statute mentioned. P. 400.
 2. The statute, by virtue of the Conformity Act, applies in the federal court; and that court acquired jurisdiction over the nonresident through service on his attorney of record. *Id.*
 3. This application of the state law is constitutional. P. 401.
- 42 F. (2d) 362; 43 *id.* 99, reversed.

CERTIORARI, 282 U. S. 831, to review a judgment of the Circuit Court of Appeals which reversed the District Court, in a suit on a contract, and dismissed the cause for want of jurisdiction. See also 35 F. (2d) 829.

Mr. W. Barton Leach, with whom *Messrs. John G. Palfrey* and *Charles F. Albert* were on the brief, for petitioner.

Mr. Asa P. French, with whom *Mr. Jonathan W. French* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case presents the question whether under the Conformity Act, U. S. Code, Title 28, § 724, and the Massachusetts statute, Gen. Laws, c. 227, §§ 2, 3, the District Court acquired jurisdiction over the respondent. The Conformity Act provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, . . . in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held." By the Massachusetts Laws, § 2, *supra*, "If an action is brought by a person not an inhabitant of the commonwealth . . . he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other." By § 3 "The writ in such cross action may be served on the attorney of record for the plaintiff in the original action." In this case the McNeal-Edwards Company, a corporation of Virginia, sold to the Frank L. Young Company of Massachusetts 1107 drums of Menhaden oil; buyers to return the drums. The buyers later sued the Virginia Company for breach of warranty of quality and attached the drums, but the attachment was inadequate security for damages and was the limit of the jurisdiction. Later the Virginia Corporation sued the buyers for the conversion of the drums, and thereupon at a still later date the buyers brought a second suit against the Virginia Corporation for the same cause of action as before, had the writ served upon the attorney of record in the Virginia Corporation's suit, and discontinued its former action. The petitioner, in short, is plainly within the Massachusetts statute, for although there is some sugges-

tion that by reason of the petitioner's former suit the suit by the Virginia Corporation was not the 'original action' within § 3 *supra*, we regard this as a mere quibble, and have no doubt that the Massachusetts law applies if the Conformity Act brings it in. The case was dismissed by the Circuit Court of Appeals for want of jurisdiction. 42 F. (2d) 362; 43 F. (2d) 99. A writ of certiorari was granted by this Court.

We have to consider the Massachusetts law so far as it applies to counterclaims arising out of the same contract that was sued upon by the Virginia Company. If there should be any objections to a wider application, they do not affect the respondent and are not open here. *Hatch v. Reardon*, 204 U. S. 152, 160. Thus limited, the law is only a slight extension of the doctrine of recoupment recognized in Massachusetts apart from statute. *Home Savings Bank v. Boston*, 131 Mass. 277, 280. We take it that there is no doubt that the Massachusetts principle would be applied in the Courts of the United States, *Dushane v. Benedict*, 120 U. S. 630; and no greater doubt if the principle were established by a code. *Clement v. Field*, 147 U. S. 467, 475. *Pacific Express Co. v. Malin*, 132 U. S. 531. *Higgins v. McCrea*, 116 U. S. 671. Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law. *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195, 196. Mr. Langdell observes that there is no necessity for such ceremony in the nature of things "for, the plaintiff being already in court *qua* plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence." Langdell, Eq. Pleading, ch. 5, § 119. The characterization of the contrary doctrine as pernicious by Mr. Justice Miller in *Partridge v. Insurance Co.*, 15 Wall. 573, is repeated in *Chicago &*

North Western Ry. Co. v. Lindell, 281 U. S. 14, 17. We see no reason to doubt the constitutionality of the present application of the state law. The policy of it is embodied in equity rule 30. See *Aldrich v. Blatchford*, 175 Mass. 369; 56 N. E. 700.

The case is within the jurisdiction of the District Court in all other respects if the respondent has been served with process effectively. We are of opinion that the service was good and that the case should not have been dismissed.

Judgment reversed.

ATLANTIC COAST LINE RAILROAD CO. *v.* POWE,
ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 600. Argued May 1, 1931.—Decided May 18, 1931.

1. In an action under the Employers' Liability Act for death of a switchman, killed while on the outside of a moving car by being brought into contact with a semaphore near the track, there is no ground to charge negligence in placing the semaphore too near the track when the distance exceeds the minimum permitted by the state railroad commission, and when it does not appear that to make the place safe by increasing the distance would have been practicable for the railroad company. P. 402.
2. The question in such cases is not whether a reasonable insurance of employees against injury should be thrown upon the traveling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort. P. 403.
3. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *Id.*
159 S. E. 473, reversed.

CERTIORARI, 282 U. S. 836, to review a judgment affirming a judgment for the present respondent in an action under the Federal Employers' Liability Act.